No. 93-1902

(3)

Supreme Court, U.S.
FILED
JUL 29 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PUERTO RICO PORT AUTHORITY,

Petitioner,

—v.—

BROTHERHOOD OF OFFICE AND COMMERCIAL WORKERS AND CATAÑO TRANSPORTATION WORKERS UNION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PUERTO RICO, SAN JUAN DIVISION

PETITIONER'S REPLY BRIEF

CAROLE O'BLENES
Counsel of Record
PROSKAUER ROSE GOETZ
& MENDELSOHN
1585 Broadway
New York, New York 10036
(212) 969-3000

DANIEL R. DOMINGUEZ
DOMINGUEZ & TOTTI
416 Ponce de Leon Avenue
Hato Rey, Puerto Rico 00918
(809) 753-7910

Attorneys for Petitioner

SAUL G. KRAMER
WENDY L. KORNREICH
Of Counsel

14pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
A. Both Questions Presented Were Timely And Adequately Raised Below	3
B. The Retroactive Penalty Provision Of The Decree Is An Unconstitutional Impairment Of The Parties' Bargained For Labor Contracts	5
C. The Retroactive Penalty Provision Unconstitutionally Penalizes The Port Authority For Past Conduct	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page(s)
Allied Structural Steel Company v. Spannaus, 438 U.S. 234 (1978)	5-8
Associated Builders and Contractors v. Baca, 769 F. Supp. 1537 (N.D. Cal. 1991)	7-8
Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988)	5
Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983)	7
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983)	7-8
Garris v. Hanover Insurance Company, 630 F.2d 1001 (4th Cir. 1980)	7
Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932)	5
Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987)	7
Landgraf v. USI Film Prods., 114 S. Ct. 1483 (1994)	5, 9
Molina v. U.R.H.C., 114 P.R.R. 382 (1983)	5
Pacheco v. Srio. Instrucción Pública, 108 P.R.R. 629 (1979)	5

Page(s)

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 5

Santiago Cruz v. Hernández Andino, 91 P.R.R. 688 (1965) 4

United States v. Halper, 490 U.S. 435 (1989) 9

Vélez Ramírez v. Romero Braceló, 112 P.R.R. 902 (1982) 5

STATUTES

P.R. Laws Ann. tit. 4, Appendix 4

P.R. Laws Ann. tit. 29, § 246(b) 2

MISCELLANEOUS

Robert L. Stern *et al.*, *Supreme Court Practice* (7th ed. 1993) 5

PETITIONER'S REPLY BRIEF

Petitioner, Puerto Rico Port Authority (the "Port Authority"), submits this memorandum in further support of its petition for a writ of certiorari to review the judgment of the Superior Court of Puerto Rico, San Juan Division, and in reply to the opposing brief of the Brotherhood of Office and Commercial Workers and Cataño Transportation Workers Union (the "Unions").

ARGUMENT

It bears emphasis at the outset that the critical points underlying this dispute have been and remain uncontroverted:

- The collective bargaining agreements between the Port Authority and the Unions (the "Labor Contracts") "provided that employees earned a greater amount of vacation leave each year than required by Mandatory Decree No. 38" (Resp. 3);[1]
- No Port Authority employee was ever prevented from taking the minimum number of vacation days required by Mandatory Decree No. 38 (the "Decree") (Pet. 6 n.9);
- Under the Labor Contracts, employees were entitled to accumulate or "bank" without limitation—for later use or for liquidation in cash upon termination of employment—only vacation days granted them under the Labor Contracts *in excess of* the vacation days required by the Decree (Resp. 3); and
- Prior to the 1989 amendment of the Decree, there was no authority that allowing the unlimited accumulation of *excess* vacation days violated the Decree; indeed, the Solicitor of Labor of Puerto Rico had ruled that employers were free to

---

[1] The pages of the Port Authority's Petition for a Writ of Certiorari are referred to as "Pet. __"; and the pages of the Unions' Brief in Opposition are referred to as "Resp. __."

determine the form and manner of granting such vacation days (Pet. 48a).[2]

Thus, it is clear that the Amended Decree, as construed below, retroactively and punitively penalizes the Port Authority for action that it was obligated to take under the Labor Contracts—*i.e.*, allowing employees to bank excess vacation without limitation. It is equally clear, despite the Unions' semantics,[3] that the penalty substantially impairs the rights of the Port Authority under the Labor Contracts by requiring it to pay for banked vacation days (in excess of those earned in two years) three times or, according to the Unions, four times[4] what it agreed in collective bargaining to pay.

---

[2] The Unions simply ignore this long-standing position of the Puerto Rico Department of Labor, which was reaffirmed after the 1989 amendment of the Decree. (*See* Pet. 16-17 & n.19, 44a, 48a.) In that regard, we note that the Port Authority does not ask the Court to decide a question of Puerto Rican law as the Unions suggest. (Resp. 12 n.10) Rather, the Department of Labor rulings constitute the regulatory backdrop against which the Port Authority entered into the Labor Contracts. Until the 1992 arbitration award at issue here, there was no reason for the Port Authority to believe that any provision of the Decree applied to vacation days in excess of the minimum number required by the Decree.

[3] Respondents contend that the Decree "simply requires double pay instead of single pay" and that the balance of the penalty imposed on the Port Authority is attributable to the operation of Law No. 96 of 1956, as amended. (Resp. 4-5) The fact remains, however, that but for the enactment of the penalty provision of the Decree, there would be no penalty applicable to the Port Authority to which Law No. 96 could be applied. *See* P.R. Laws Ann. tit. 29, § 246(b) (Pet. 33a). Leaving semantics aside, the real effect of the penalty provision of the Decree is to require the Port Authority to pay three days' pay for each day of vacation banked in excess of the number of vacation days earned in two years even if the vacation was banked before July 6, 1989: (a) one day's pay for each such vacation day, plus (b) a penalty of one day's pay under the new penalty provision of the Decree, plus (c) a third day's pay by operation of Law No. 96, which doubles the one-day penalty imposed by the Decree.

[4] Respondents argue that the application of Law No. 96 would "double[] the Port Authority's obligation from double pay for each day of vacation

(continued...)

The retroactive application of this penalty, moreover, does not further the articulated public purpose of the penalty provision of the Decree, for no Port Authority employee was "kept from taking his annual leave for over two years." (Pet. 7, 4a)

In these circumstances, it is evident that the judgment below is in conflict with the decisions of this Court applying the Contract Clause and the Ex Post Facto Clause of Article I, Section 10. Nor should the Unions' procedural argument (Resp. 7-10) be permitted to obscure the appropriateness of a writ of certiorari here. Both questions presented by the petition were timely raised below as a matter of Puerto Rican law and the Unions have cited no authority whatsoever to the contrary. Both the Contract Clause and Ex Post Facto Clause issues were properly and adequately raised as a matter of federal law as well. As the Unions concede, in appropriate circumstances, the Court has "considered on writ of certiorari a federal question raised for the first time in a petition for rehearing that was denied without comment by a state supreme court." (Resp. 9) Precisely such appropriate circumstances are presented here.

Certiorari should therefore be granted in order to address and correct the retroactive—and punitive—enlargement of the Port Authority's obligations under the Labor Contracts.

A. Both Questions Presented Were Timely And Adequately Raised Below.

As set forth in the petition, under Puerto Rican law, a question of law (including a constitutional question) may be raised before the Supreme Court of Puerto Rico even if it was not raised below. *See* Pet. 8 n.11. The Unions apparently concede that point but argue that the cases relied on by the Port Authority do not

---

[4](...continued)

improperly accumulated . . . to four days' pay." (Resp. 5) The Port Authority vigorously disagrees with that interpretation but notes that, even if it were correct, it would simply result in a more oppressive and even more obviously punitive penalty.

address the precise circumstance of raising a new question on motion for reconsideration. (Resp. 7-8) However, they cite no authority establishing, or even suggesting, that a legal question may not be raised for the first time on such a motion. This is not surprising, for the Supreme Court of Puerto Rico has repeatedly eschewed wooden application of procedural rules and emphasized that cases should be decided on the merits. As the Supreme Court of Puerto Rico stated nearly three decades ago,

> [W]e must discard the outmoded theory that an appellant may never change, on appeal, his theory of the case. We stated that such theory constitutes only a ritual which is inconsistent with the need of deciding the cases on the merits.

Santiago Cruz v. Hernández Andino, 91 P.R.R. 688 (1965); *see also* Pet. 8 n.11 and cases cited therein.

Furthermore, Rule 45 of the Rules of the Supreme Court of Puerto Rico permits the filing of two motions for reconsideration *as of right* prior to the issuance of the mandate. P.R. Laws Ann. tit. 4, Appendix IA. No limitation is stated in those Rules on the raising of any legal question for the first time on such a motion. Thus, as a matter of Puerto Rican law, under the Rules of the Supreme Court of Puerto Rico and its decisions, the questions presented were timely raised below.

They were also timely and adequately raised as a matter of federal law. This is so because, in rejecting the Port Authority's petition for review, the Supreme Court of Puerto Rico unexpectedly declined to apply a well-established and "general rule of interpretation," embodied in Article 3 of the Civil Code of Puerto Rico, "which prohibits the retroactive application of the laws." (Pet. 24a) Given the unanticipated nature of that ruling, the motion for reconsideration was the first opportunity for the Port Authority to raise the federal constitutional questions arising from the ruling

and the Port Authority took that opportunity.[5] In analogous circumstances, this Court has recognized that federal claims have been adequately presented even though not raised in the lower court or, in the first instance, before the highest state court. *See, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85-86 n.9 (1980); *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-67 (1932); *see also* Robert L. Stern *et al.*, *Supreme Court Practice*, 129 & n.43 (7th ed. 1993) and cases cited therein.

Furthermore, the Ex Post Facto Clause, as well as the Contract Clause, was raised by the Port Authority's argument below based on Article I, Section 10, of the Constitution. The Port Authority objected below to the penalty imposed upon it on the same basis as it does before this Court—that the penalty "retroactively penalizes" it in violation of Article I, Section 10, of the Constitution, which includes the Ex Post Facto Clause.[6] As this Court has recognized, there is a unifying theme in the clauses contained in that section, specifically the Contract and Ex Post Facto Clauses, in their protection against retroactive state action. *See Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1497 (1994).

B. The Retroactive Penalty Provision Of The Decree Is An Unconstitutional Impairment Of The Parties' Bargained For Labor Contracts.

As set forth in the petition, this Court's decision in *Allied Structural Steel Company v. Spannaus*, 438 U.S. 234 (1978), is controlling here. The judgment below is clearly in derogation of the

---

[5] It also bears emphasis that the Supreme Court of Puerto Rico has repeatedly ruled that all statutory issues should be exhausted before constitutional questions are addressed. *Molina v. U.R.H.C.*, 114 P.R.R. 382, 384-85 (1983); *Vélez Ramírez v. Romero Barceló*, 112 P.R.R. 902, 918 (1982); *Pacheco v. Srio. Instrucción Pública*, 108 P.R.R. 629 (1979).

[6] This is not a case where the petitioner merely "invok[ed] the Constitution in state court and await[ed] review in this Court to specify the constitutional provision it is relying upon"; nor did the Port Authority rely below on any generalized reference to "constitutional principles." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988).

teaching of *Allied* that a state may not enact legislation that substantially alters the relationship between employer and employee by "superimposing . . . obligations . . . conspicuously beyond those that [the employer] had voluntarily agreed to undertake." 438 U.S. at 240; *see also* Pet. 14-18.

The Unions incorrectly assert that the prior regulation of vacation leave protects the retroactive application of the subsequently-enacted penalty from constitutional scrutiny under *Allied* and this Court's subsequent Contract Clause decisions. (Resp. 11-13) What the Unions ignore, however, is that the prior regulation pertained to *statutorily-mandated* vacation days.[7] Regulation of the additional, collectively-bargained days, truly was unanticipated and has resulted in "a completely unexpected liability in potentially disabling amounts." *Allied*, 438 U.S. at 247.

With the regulatory background that existed prior to July 1989, the Port Authority simply could not have foreseen an attempt to alter retroactively the carefully negotiated balance of obligations—beyond those already imposed by law—that the Labor Contracts represent. This is especially so in light of the well-recognized policies that favor collectively-bargained arrangements. *See, e.g.*, Pet. 12a-13a ("'*The importance that the collective bargaining agreement has in the labor field can hardly be overestimated*. . . . [T]he collective bargaining agreement is a mechanism that, as such, *has force of law between the undersigned parties* as long as it does not violate the laws, morals or public order.'"). Indeed, this case presents even more compelling

---

[7] Contrary to the Unions' assertions (Resp. 12 & n.10, 15 n.14), the Port Authority has not mischaracterized the arbitrator's ruling; nor is it error to state that the law in effect before July 6, 1989, permitted the banking of vacation in excess of that required by the Decree. *See* Pet. 16-17 & n.19. The Unions' misperceptions in that regard appear to rest on a failure to distinguish between mandated and collectively bargained vacation days, a misreading of the decisions of the arbitrator and the Superior Court and/or a misunderstanding of the articulated purpose of the penalty provision of the Decree. (*See* pp. 8-9, *infra*.)

circumstances than did *Allied* for upholding settled contractual expectations because the Decree truly would force the Port Authority to "exceed [its] *bargained-for* expectations." *Allied*, 438 U.S. at 246 n.18 (emphasis added).

Similarly, the interference at issue here—which affects transportation industry employers like the Port Authority who agreed to provide vacation in excess of the statutory minimum and to allow the "banking" of such leave—is hardly a "generally applicable rule of conduct," like those upheld by the Court in the cases cited by the Unions. *See Exxon Corp. v. Eagerton*, 462 U.S. 176, 192 (1983) (cited in Resp. 12 n.12). In *Exxon*, as well as the other cases relied on by the Unions, the challenged legislation was sustained based upon a broad social policy it furthered. *See Exxon*, 462 U.S. at 191 (challenged statute "protect[ed] consumers from excessive [oil and gas] prices"); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 417 (1983) (challenged statute designed to "protect consumers from the escalation of natural gas prices caused by deregulation"); *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 504-05 (1987) (regulations requiring certain amounts of coal to remain in the ground, unmined, necessary to prevent potential destruction of thousands of structures throughout state).

The Unions' attempt to distinguish the lower court authority relied on by the Port Authority fails for the same reason. It is not correct that the interests furthered by the Decree are of a broad nature, in contrast to the interests served where retroactive legislation has been struck down. To the contrary, the Decree serves the interests of a defined class of employees by directly intervening in their relationship with their employers. Thus, as in *Garris v. Hanover Insurance Company*, 630 F.2d 1001 (4th Cir. 1980), the state is retroactively—and unconstitutionally—impairing a private contractual relationship for the sole benefit of one of the parties to that contract. Also particularly apposite is *Associated Builders and Contractors v. Baca*, 769 F. Supp. 1537 (N.D. Cal. 1991), which the Unions entirely failed to address, where the court

found that the challenged statute violated the Contract Clause because (like the Decree) it impaired the terms of a collective bargaining agreement by raising the employers' obligations after the fact. (Pet. 14)

Unlike the decisions relied on by the Unions, *Allied* speaks directly to the relationship between an employer and its employees—specifically addressing the obligations of the former to the latter—and to the limits upon a state's interference in that relationship to expand the employer's obligations. In *Exxon*, this Court held that where the impairment of private contracts is incidental to the main effect of the challenged legislation (*e.g.*, "shielding consumers from the burden of the tax increase") then there is no Contract Clause violation. 462 U.S. at 192. On the other hand, it recognized, where the sole effect is to "'adjust[] the rights and responsibilities of contracting parties,'" the state legislation is invalid under the Contract Clause. *Id.* (quoting *Allied*, 438 U.S. at 244). The instant case falls squarely in the latter category.

Finally, the Unions do not even purport to demonstrate any reasonable and necessary relationship between retroactive application of the penalty provision to the Port Authority and the articulated public purpose of the penalty. Instead, they distort the public purpose, to the extent that they address it at all.

As articulated by the courts below and the arbitrator, the public policy underlying the penalty provision of the Decree is not "that *no* vacation time could be accumulated for more than two years." (Resp. 15 n.14) Rather, in the words of the Supreme Court of Puerto Rico, the public policy is "that no employee works more than two years without enjoying his vacations." (Pet. 25a) *See also* Pet. 4a (Superior Court describing arbitral award as "consonant with and in support of public policy that no employee should be kept from taking his annual leave for over two years"); Pet. 16a (arbitrator referring to public policy as "encourag[ing] that an employee not work over two years without taking a break for a well-deserved rest").

Yet, it is uncontroverted that no Port Authority employee was prevented from taking his vacation (or allowed to bank all his vacation) for even one year, let alone two years. To the contrary, employees were permitted to bank only "vacation leave in excess of 20 days per year" (Resp. 3) and thus were required to take at least 20 days of vacation each year—a number that exceeded the minimum number of vacation days required by the Decree. Accordingly, there has been no showing, nor could there be, that retroactive application of the penalty provision of the Decree fosters its stated public purpose.

C. The Retroactive Penalty Provision Unconstitutionally Penalizes The Port Authority For Past Conduct.

The Unions' response to the Port Authority's reliance on the Ex Post Facto Clause is unavailing as well. Indeed, the cases cited by the Unions do not even address the vital issue here: the imposition of civil damages that are penal in nature on the basis of prior conduct. As demonstrated in the petition, the penalty imposed by the Mandatory Decree is penal in nature—serving the "'twin aims of retribution and deterrence'" that brand a punishment as such. Pet. 24-25 (quoting *United States v. Halper*, 490 U.S. 435, 448 (1989)). And, as this Court observed in *Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1505 (1994), "[r]etroactive imposition of punitive damages would raise a serious constitutional question."

The Unions' suggestion that this Court's admonition in *Landgraf* referred to the Ex Post Facto clause merely by way of analogy (Resp. 17) merits little response. The Court not only accompanied its admonition with citations to cases discussing the Ex Post Facto Clause but also chose to quote from the sections of those cases specifically discussing the Ex Post Facto Clause. *See Landgraf*, 114 S. Ct. at 1505 ("*De Veau v. Braisted*, 363 U.S. 144, 160 (1960) ('The mark of an ex post facto law is the imposition of what can fairly be designated punishment for past acts'). See also *Louis Vuitton S. A. v. Spencer Handbag Corp.*, 765 F.2d 966, 972 (CA2 1985) (retroactive application of punitive treble damages

provisions of Trademark Counterfeiting Act of 1984 'would present a potential ex post facto problem')."); Pet. 24.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, a writ of certiorari should be granted and the judgment below should be reversed.

Respectfully submitted,

Carole O'Blenes
Daniel R. Dominguez
Attorneys for Petitioner

Saul G. Kramer
Wendy L. Kornreich
Of Counsel

July 29, 1994